FEDERATION REPORTS.

TYE ONG KIAT & ANOR. v. TAN GUAN HOO.

[Orig. Civ. Juris. (Jobling, J.) April 5, 1951]

[Penang — Civil Suit No. 188 of 1950]

Contract for sale — Specific performance — Defence of frustration — Debtor and Creditor (Occupation Period) Ordinance, 1948.

Defendant entered into an agreement during the Japanese occupation of Malaya in July, 1945 to sell certain property to plaintiffs subject inter alia to the property being freed from encumbrances and the permission of the Perak Government being obtained. Plaintiffs paid the purchase price and defendant paid off the only charge on the property. Defendant applied to the Perak Government for permission to transfer but received no reply. The Moratorium Proclamation then came into force and rendered performance of the agreement impossible. When the moratorium was lifted the Debtor and Creditor (Occupation Period) Ordinance, 1948 was in force and gave the mortgagee the right to reinstatement of his charge for the revalued amount of the mortgage debt. Defendant pleaded frustration on the ground that the agreement was for repayment of the mortgage debt in occupation currency which was now impossible. He contended that the law cast the burden of the new charge on the land and offered to transfer subject to the mortgage.

Held, that the contract had not been frustrated. The manner in which defendant freed the land from encumbrances was entirely a matter within his discretion and outside the terms of the contract. The Debtor and Creditor (Occupation Period) Ordinance, 1948 does not cast a burden on the land but on the defendant for payment of the amount of his revalued personal obligation. The reinstatement of the charge is only to ensure repayment. Specific performance ordered.

CIVIL SUIT.

Ong Huck Lim for the plaintiffs.

F. G. Pooley for the defendant.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Jobling, J. : — The plaintiffs' claim is for specific performance of an agreement for sale of certain premises made between themselves and defendant and alternatively, for damages.

The facts are not in dispute. The defendant by an agreement for sale executed on 10th July, 1945 agreed to sell the premises in question to plaintiffs for the sum of $30,000/- and clause 1 of the agreement sets out that

"The Vendor sells and the Purchasers buy the aforesaid land and hereditaments subject to:—

(a) The Vendor deducing a good and marketable title to the property sold;

(b) The property sold to be freed from all encumbrances;

(c) Permission of the Government of Perak sanctioning the said sale."

The purchase price of $30,000/- was paid to the defendant and the plaintiffs entered into possession. The property was at the time under a charge of $2,000/- to a Third Party and defendant on receipt of purchase price paid off this charge and freed the property from all encumbrances. In July, 1946 the defendant confirmed the sale by another agreement but this appears to be void under Part IV of the Moratorium Proclamation No. 5 of 1945 and is not relied upon by the plaintiffs.

In 1949 the plaintiffs demanded legal transfer of the property but the defendant replied that as the chargee was claiming reinstatement of his charge under the Debtor and Creditor (Occupation Period) Ordinance, 1948, any transfer would therefore be subject to the charge. Plaintiffs refused to accept a transfer on these terms and demanded that the defendant transfer the property free from all encumbrances as agreed.

The plaintiffs rely on the agreement for sale.

The defendant admits the execution of the agreement and says he paid off the charge on receiving the consideration from the plaintiffs and applied to the Perak Government for sanction of the sale but received no reply. The Moratorium Proclamation No. 5 of 1945 then came into operation and rendered it impossible for him to complete the transfer. When the moratorium was lifted the Debtor and Creditor (Occupation Period) Ordinance, 1948 was in force and gave the chargee the right to reinstatement of his charge on the land. Defendant asserts that the intention of the parties was that the charge should be paid off in occupation currency but the alteration of the law has frustrated that intention.

Defendant also claims that he did in fact free the premises from the charge and therefore has performed this part of the agreement. He contends that the law has imposed a new burden on the land and that must lie where it falls, namely on the land and on the plaintiffs.

The defence is therefore two-fold, first that the performance of the contract has been rendered impossible by the alteration of the law and alternatively, that he has performed such part of it as could be performed and is willing to complete by transferring the land to plaintiffs.

There does not appear to be any substance in the second of these defences. The parties agreed that the premises were to be freed from all encumbrances and the plain intention of the parties was that the land should be transferred to the plaintiffs free of encumbrance.

Defendant's action has not given effect to this intention and the condition is still subsisting as part of the contract.

As regards the other submission, to establish the defence of frustration the defendant must show that the alteration of the law has affected the basis of the contract in some way.

The contract here was for the scale of the premises in question free from encumbrances for the consideration of $30,000/- in occupation currency. There is nothing to show that the plaintiffs were interested in any way in the manner in which defendant freed the premises from encumbrances. They may have been aware that defendant intended to pay off the charge in occupation currency but it was no part of the contract that this should be done or that the plaintiffs should suffer any losses or benefit from any profits arising from the form in which the charge was paid off. The manner in which the defendant freed the land from encumbrances was entirely a matter within his discretion and outside the scope of the contract.

The law has now cast an additional burden on the defendant but his claim that this is a burden on the land is mistaken. The claim allowed by the Debtor and Creditor (Occupation Period) Ordinance is for revaluation of a pre-occupation debt which has been paid without demand in occupation currency. It is a debt due by the defendant personally and the provision for reinstatement of the charge in certain circumstances is only to ensure the defendant discharges his liability.

The law has not made the performance of this contract impossible and an order for specific performance must be made.

Mr. Ong Huck Lim has asked for an order for payment of damages in the event of defendant transferring the property subject to the charge. The position is that the chargee has not yet applied to the Court for revaluation of the payment made to him in discharge of his charge and until he makes such an application and proves to the satisfaction of the Court that he comes within one of the prescribed exceptions the payment made by defendant is a valid discharge of his liability. There can therefore be no order respecting damages at present.

The order will be for the specific performance of the contract as prayed with liberty to apply for the assessment of damages in the event of the charge on the land being reinstated.

Defendant to pay the costs of the action.

Specific performance ordered.

KHOO SOO JIN & ANOR. v. LYE YEW SONG.

[Orig. Civ. Juris. (Jobling, J.) April 12, 1951]

[Penang — Originating Summons No. 338 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 4(2)(b)(ii) —Mortgage — Principal and Interest — Mortgagees taking possession to collect Interest.

In this case the respondent mortgaged his property to the applicants before the Japanese occupation of Malaya to secure a loan and repaid the loan in February, 1945 in occupation currency.

Applicants entered into possession of the property as mortgagees in March, 1944 to obtain payment of interest under the mortgage.

A demand for repayment of the debt was alleged by respondent and denied by applicants.

Held, that no verbal or written demand for repayment was made. The interest and principal could not be separated and together they constituted the debt under the mortgage. Applicants by entering into possession had taken steps to enforce payment of the whole debt. This was notice to the respondent that repayment of the whole debt was required and was a demand within the meaning of section 4(2)(b)(ii) of the Ordinance.

Cases referred to :—

(1) *Bovill v. Endle* (1896) 1 Ch. Div. 648.

(2) *Ex Parte Wickens* (1898) 1 Q.B. 543.

ORIGINATING SUMMONS.

C. O. Lim for the applicants.

T. E. Conaghan for the respondent.

The facts sufficiently appear from the judgment.

Cur. Adv. Vult.

Jobling, J. : — The applicants' claim is for revaluation under the Debtor and Creditor (Occupation Period) Ordinance, 1948 of a preoccupation debt which was repaid in occupation currency, and reinstatement of the security formerly held by them in respect thereof.

The applicants allege that the debt was repaid without demand by them and the respondent gave evidence that he only repaid under pressure from the applicants.

On the point of whether there was an actual demand made by the applicants Mr. Lim Gim Hoe gave evidence, supported by letters written by him at the time, that the initiative in paying the debt was taken by the respondent. Mr. Lim Gim Hoe is an advocate and solicitor of this Court and I accept his evidence unreservedly and find that no verbal or written demand was made by applicants.

It is, however, admitted by the applicants that in March, 1944 in exercise of their rights as mortgagees they entered into possession of the mortgaged property, collected the rents therefrom and credited the amount